IN THE

Supreme Court

OF THE

United States

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EDWARD C. SCHUBERT, JOHN T. [illegible]
WILLARD B. HOWELL,

Petitioners,

vs.

A. BIRCH & SONS CONSTRUCTION CO., a [illegible]
and MORRISON-KNUDSEN CO., a corporation,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Harmon Printing & Binding Company, Seattle

No. .....

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

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EDWARD C. SODERBERG, JOHN J. KISSANE and WILLARD B. HOWELL,

Petitioners,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation, and MORRISON-KNUDSON CO., a corporation,

Respondents.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

# Supreme Court of the United States

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Petitioners,

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S. BIRCH & SONS CONSTRUCTION CO., a corporation, and MORRISON-KNUDSON CO., a corporation,

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To: The Honorable Fred M. Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

EDWARD C. SODERBERG, JOHN J. KISSANE and WILLARD B. HOWELL respectfully petition this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals (Judges Garrecht, Matthews and Healy) rendered its judgment July 9, 1947 (R. 643). The decision, reported at ..... F.(2d) ....., affirmed a final judgment of the District Court of the Western District of Washington, Northern Di-

vision, in favor of respondents as to the periods of employment of the respective claimants here involved, denying petitioners any recovery for overtime wages alleged to be due under the Fair Labor Standards Act of 1938, 29 U.S.C. 207 (a) and 216 (b). The District Court's opinion is not reported but appears at R. 611-618. The opinion by the Circuit Court of Appeals appears at R. 633-642.

**SUMMARY STATEMENT OF MATTER INVOLVED**

This is an action for overtime compensation under the Fair Labor Standards Act of 1938. This petition is sought on behalf of petitioners and 26 former employees of respondents.

The regular rate of pay, the number of overtime hours and the amounts due petitioners as assignees of the employees are all admitted and are noted in the margin.[1]

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[1]The employees worked for a stipulated salary per 48-hour week. The regular rate of pay was 1/48 of the stipulated salary. They had a uniform work week of 70 hours per week at the rate of 10 hours per day for which they were paid their stipulated salary for 48 hours and two times their regular rate for the 10 hours occurring on their seventh day of the week. They have thus due them one-half their regular rate for the hours between 40 and 48 each week; 1½ times their regular rate for the hours each week between 48 and 60. The overtime compensation due under the Act, together with an equal amount as liquidated damages for the respective claimants, is as follows:

| Name | Cause of Action | Amount Due |
|---|---|---|
| Edgar W. Scheid | 18th | $1303.74 |
| Edward C. Soderberg | 2nd | 2144.38 |

The issue is whether the duties of the claimants are activities in "commerce," which in turn, is dependent upon whether the goods upon which they worked are in "commerce."

The United States Government entered into cost-plus-a-fixed-fee contracts with respondents for the latter to build fortifications in the Aleutian Islands, Alaska (R. 184).

Ninety-four per cent of the supplies for such buildings were ordered by the Government and six per cent by the respondents. Title to such goods was vested in the Government, usually at the vendor's place of business, directly from the vendor and not through the respondents (R. 185).

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| | | |
|---|---|---|
| Willard B. Howell | 3rd | 2053.12 |
| James A. Stewart | 13th | 417.08 |
| Louis D. Mayfield | 15th | 1350.42 |
| William H. Taylor | 23rd | 696.04 |
| John N. Sinema | 24th | 1660.20 |
| V. Herbert Showalter | 22nd | 872.08 |
| Edward A. Cox | 29th | 297.92 |
| Clifford S. Wilcox | 30th | 1313.54 |
| D. A. Buchanan | 37th | 476.66 |
| Louis A. Krampert | 38th | 665.62 |
| Gilford N. Brown | 60th | 430.62 |
| Clarence F. Kouns | 64th | 297.92 |
| Miles J. Hazelberg | 7th | 1253.96 |
| DeWitt T. Ferrell | 8th | 465.84 |
| Louis R. Strini | 17th | 1153.74 |
| William L. Downs | 33rd | 476.66 |
| Charles E. Roach | 61st | 920.82 |
| Edgar R. Ayres | 67th | 2137.50 |
| J. Frank Lindgren | 10th | 1868.76 |
| John L. Robinson | 68th | 323.74 |
| Henry Gordon Law | 77th | 1608.74 |
| Henry B. Stockemer | 62nd | 1310.82 |
| Orville D. Smith | 80th | 1083.32 |

These goods were transported by rail and truck to Seattle (R. 185), crated by Government or private companies; shipped by boats operated by the War Shipping Administration, or the Transportation Corps without charge to respondents, to the particular Island in the Aleutian group where the goods were to be used (R. 186).

On arrival at each of the respective islands, the boats were unloaded by Army Personnel, who also moved the goods to a sorting or classification yard one-half mile away operated by the Army (R. 186). In this yard respondents had two employees, assignors of petitioners, and claimants[2] herein, classified as "expediters," whose duties consisted of claiming the materials, supplies and equipment to be used by the respondents from those to be used by other cost-plus-a-fixed-fee contractors at the Island (R. 187).

From this yard the goods so claimed by the two expediters were transported by Government trucks operated by Army or respondents' personnel to government owned warehouses, occupied and used by the respondents.

At one of the islands (Project 502), all materials were transported from the yard to central warehouses (R. 187-188), where the respondents had thirteen employees working, assignors of the petitioners, and claimants.[3] The duties of these

[2]Edgar W. Scheid, Eighteenth Cause of Action, and John L. Robinson, Sixty-eighth Cause of Action. (R. 187)

[3]Willard B. Howell, Third Cause of Action; James A. Stewart, Thirteenth Cause of Action; Louis D.

warehousemen were to tally or list the goods received, transfered or issued, properly stow the goods and maintain perpetual inventories and make receiving reports of the goods received in the warehouses (R. 188).

Resale goods for Project 502 were thereafter transported from the central warehouse to the resale warehouse (R. 188, 191), where the respondents had five employees working, who are assignors of the petitioners, and claimants herein.[4] The duties of these five employees were to keep records of the transfer of supplies to the resale warehouse, and from the resale warehouse to the commissary store (R. 191-192).

The resale goods were then transported from the resale warehouse to the commissary store, where the respondents had two employees working, assignors of petitioners, and claimants[5] herein. The

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Mayfield, Fifteenth Cause of Action; William H. Taylor, Twenty-third Cause of Action; John H. Sinema, Twenty-fourth Cause of Action; V. Herbert Showalter, Twenty-second Cause of Action; Edward A. Cox, Twenty-ninth Cause of Action; Clifford S. Wilcox, Thirtieth Cause of Action; D. A. Buchanan, Thirty-seventh Cause of Action; Louis A. Krampert, Thirty-eighth Cause of Action; Gilford N. Brown, Sixtieth Cause of Action; Edward C. Soderberg, Second Cause of Action; Clarence F. Kouns, Sixty-fourth Cause of Action. (R. 189-190, 192)

[4]Miles J. Hazelberg, Seventh Cause of Action; DeWitt T. Ferrell, Eighth Cause of Action; Louis R. Strini, Seventeenth Cause of Action; William L. Downs, Thirty-third Cause of Action; Charles E. Roach, Sixty-first Cause of Action. (R. 193)

[5]J. Franl. Lindgren, Tenth Cause of Action;

duties of these two employees consisted of making lists of goods received, inventories of goods on hand, and a monthly commissary report, and selling the goods over the counter to the construction workers and soldiers on the Island (R. 191, 192). All receipts, including profits, from the commissary were transmitted to the Government (R. 191).

The balance of the goods at Project 502 went from the central warehouses to storage warehouses for issuance as needed (R. 188).

At Project 500 resale goods went directly from the yard to the resale warehouse (R. 187), where respondents had one employee working, assignor of the petitioners, and a claimant[6] herein, whose duties were the same as the resale warehousemen at Project 502 (R. 191-192). From the resale warehouse, the resale goods were transported to the commissary where the respondents had two employees working, assignors of the petitioners, and claimants[7] herein, whose duties were the same as the resale commissary clerks at Project 502 under identical conditions (R. 191, 192).

The balance of the goods at Project 500 were transported from the yard to the central warehouse (R. 187), where the respondents had one employee working, assignor of the petitioners, and a claim-

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V. Herbert Showalter, Twenty-second Cause of Action. (R. 193)

[6]Edgar R. Ayres, Sixty-seventh Cause of Action. (R. 193)

[7]John L. Robinson, from July 3, 1944, to August 3, 1944, Sixty-eighth Cause of Action; and Henry Gordon Law, Seventy-seventh Cause of Action. (R. 194)

ant[8] herein, whose duties were the same as the central warehousemen at Project 502 (R. 188). From the central warehouse, the goods were transported to storage warehouses, where the respondents had one employee working, assignor of the petitioners, and a claimant[9] herein, whose duties were identical to central warehousemen (R. 188). From the storage warehouses the goods were issued as needed to the projects.

270 million pounds of materials, supplies and equipment followed the foregoing route during the period here involved (R. 185).

The foregoing statement of facts is drawn from the Findings of Fact (R. 182-194).

The District Court concluded that the duties of the two expediters, thirteen central warehousemen, five resale warehousemen, two commissary clerks at Project 502; and one resale warehouseman and two commissary clerks at Project 500 were not within the coverage of the Act because the respondents' principal activity was to build a military base (R. 612). The Circuit Court of Appeals held merely that the petitioners had not sustained their burden of proof (R. 641) ..... F.(2d) at page .....

**REASONS RELIED ON FOR ISSUANCE OF WRIT**

As in *National Labor Relations Board v. Waterman Steamship Co.*, 309 U.S. 206, 208 (1940), this Court should review a factual question in this case because the Circuit Court of Appeals has short-

[8]Henry B. Stockemer, Sixty-second Cause of Action. (R. 190)

[9]Orville D. Smith,Eightieth Cause of Action. (R. 190)

circuited Findings of Fact, which neither party attacked, to hold:

a. The plaintiffs have failed to sustain their burden of proof of interstate commerce; and thus
b. That the duties of warehousemen at successive intrastate steps to get goods to their final destination, and in receiving goods at their final destination, such goods having been transported from without the state, are not activities in interstate commerce, contrary to the rule of *Walling v. Jacksonville Paper Company*, 317 U.S. 564.

**PRAYER**

WHEREFORE, Your petitioners pray that this Honorable Court issue its writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and proceedings in the instant case, to the end that said case may be reviewed and determined by this Court, as provided by law, and that said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

Dated at Seattle, Washington, this 19 day of Sept., 1947.

Respectfully,

OSCAR A. ZABEL,
FREDERACK PAUL,
*Counsel for Petitioners.*
518 Fourth & Pike Building,
Seattle, Washington.

ZABEL, POTH & PAUL,
*Of Counsel.*

## BRIEF

This is an action for overtime compensation brought under the Fair Labor Standards Act of 1938, 52 Stat. 1063, 29 U.S.C., Sections 201-219. Under Section 7 (a), the employer is required to pay for excess hours of work not less than one and one-half times the regular rate.[10]

An employer who violates this sub-section is liable to his injured employees in the amount due and unpaid and an additional equal amount as liquidated damages.[11]

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[10]Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * for a work week longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. * * *

[11]Sec. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves any other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of the action.

## DATES OF JUDGMENT BELOW AND REFERENCE TO OFFICIAL REPORTS

The district court entered its judgment November 9, 1945 (R. 217). Its opinion is not reported but appears on R. 611-618. The circuit court of appeals entered its judgment July 9, 1947 (R. 643). Its decision is reported at ..... F.(2d) ..... and at (R. 633-642). This petition is served and filed within three months from July 9, 1947, 28 U.S.C. Section 350.

## SPECIFICATION OF ERRORS

The circuit court of appeals erred as follows:

1. In relying upon a conclusion of law that the claimants' duties "were not in commerce, or in the production of goods for commerce," found in the findings of fact *as a finding* of fact.

2. In refusing to be bound by findings of fact of the district court setting forth the route of the goods alleged to be in commerce and the duties of the claimants in respect to such goods.

3. In holding that the claimants had not sustained their burden of proof of establishing their respective duties as being in commerce.

4. In holding that the duties of warehousemen at successive intrastate steps to get goods to their final destination and in receiving goods at their final destination, such goods having been transported from without the state, are not activities in interstate commerce.

## ARGUMENT

This case involves simply a refusal by the circuit court of appeals to apply the rule of *Walling v.*

*Jacksonville Paper Co.*, 317 U.S. 564, to warehousemen handling and receiving out-of-state goods prior to and at their final destination.

The rationale of the circuit court of appeals is, however, that the claimants failed to sustain their burden of proof and so we must first direct our attention to two procedural problems, stated in our first two specifications of error.

This petition is based upon the findings of fact of the district court, which neither party attacked. In these findings, the district court inserted an additional sentence that the claimants and each of them "were not engaged in commerce or in the production of goods for commerce" within the meaning of the Act (R. 187, 188, 192) reiterated as a conclusion of law (R. 208).

The circuit court of appeals asserted the district court "found" the claimants were not employed in commerce (R. 636) and concluded the "finding" was correct (R. 641) by short-circuiting the balance of the findings and examining the testimony and stipulations in the record which were never collected by either counsel for review by the court as to these claimants. This so-called "finding" relied on by the circuit court of appeals is not a "finding" at all. It is a conclusion of law or an ultimate fact, *Norris v. Jackson*, 76 U.S. 125, for which a reviewing court can substitute its own judgment without a presumption of correctness, *Bogardus v. Commissioner*, 302 U.S. 35, 39. Cf. *Winnett v. Helvering* (C.C.A. 9, 1934) 68 F.(2d) 614, 615.

**THIRD AND FOURTH SPECIFICATION OF ERRORS**

The real issue, in our view, is whether the handling of out-of-state goods at successive intrastate warehouses and the receiving of them at their final destination, the commissary store or storage warehouses, are within the rule of the *Jacksonville Paper Co.* case.

The rule is found at 317 U.S. at page 567-568 and may be described as follows: the interstate journey continues up to the point where the parties at the inception of the movement intended the goods to go.

Neither lower court has made a finding of where the final destination of these goods was. It is plain, however, from the findings of fact, that the 130,000 tons of goods were purchased and transported to sell over the counter in the commissary and to build a military base in Alaska. That these two, and only these two, were their final destination for the respective types of goods, was known from the moment of their being purchased. It was neither at the dockside, nor the sorting yard, nor the central warehouse, nor the storage warehouses. It was still later in their route, namely: at the commissary and at the construction site.[12]

Our interpretation of the *Jacksonville Paper Co.* case is confirmed by *Walling v. American Stores*, 133 F.(2d) 840, (C.C.A. 3) where the intrastate movement of out-of-state goods at issue was from

[12]It is unnecessary to determine that the construction site was the final destination, because none of the claimants worked at such point and hence it is not at issue, the claimants having worked at an earlier step in the interstate journey.

warehouses to retail stores; by the Administrator of the Wage & Hour Division, Department of Labor, in a statement issued by him in March, 1946, 1947 W.H. Man. p. 9; by *Mid Continent Petroleum Corp. v. Keen* (C.C.A. 8) 157 F.(2d) 310; and by *Walling v. Herlihy*, 161 F.(2d) 568 (C.C.A. 4)

We now turn to the duties performed by the respective groups of claimants. From the docks the goods were transported to a sorting yard where two of the claimants classified as "expediters" claimed respondents' goods from those consigned to other cost-plus-a-fixed fee contractors. From the sorting yard, the goods were transported to central warehouses where thirteen claimants tallied or listed the goods received, transferred, or issued, properly stowed the goods and maintained perpetual inventories and made receiving reports in the warehouse. The resale goods were thence transported to the resale warehouse where five claimants worked who kept records of the transfer of supplies to the resale warehouses and from the resale to the commissary store. The resale goods were thence transported to the store where two claimants worked whose duties were to make lists of goods received, inventories of goods on hand, a monthly commissary report and to sell the goods over the counter to the construction workers and soldiers on the Island. There are no claimants involved at Project 502 who worked in the storage warehouse where construction supplies were stored. The construction supplies were transported from the central ware-

house to storage warehouses and thence issued as needed.

It is thus plain that the duties of these claimants and the route of the 130,000 tons of goods distinguish this case from *Higgins v. Carr Bros. Co.*, 317 U.S. 572, and cases having similar facts.[13]

In each of this latter group of cases, no one knew where the goods were going after deposit in the warehouses, for the employers-wholesalers sold them to a miscellany of stores, and the duties of the claimants occurred after the goods arrived at the warehouses. Here, the expediters worked on the goods prior to arrival at the warehouses; the central warehousemen checked the goods in and out of the central warehouse; the resale warehousemen checked the resale goods in and out of the resale warehouse; the commissary clerks checked the resale goods in at the commissary and the storage warehousemen checked the goods in and out of the storage warehouse to the construction project. Here the goods invariably followed a fixed pattern to specified points: to the commissary and at least to the storage warehouses for issuance as needed.

Government title to the goods does not make its transportation an administrative act of the government and hence not commerce (if that be a valid doctrine, for we have found no case of this court, nor has counsel cited any, to support it), for the "particular point at which title and custody * * *

[13] *Domenech v. Pan American Standard Brands*, 147 F.(2d) 994 (C.C.A. 1); *Jewel Tea Co. v. Williams*, 118 F.(2d) 202 (C.C.A. 10).

pass to the purchaser without arresting its movement to the intended destination, does not affect the essential interstate nature of the business." *Illinois Natural Gas Co. v. Public Service Comm.*, 314 U.S. 498, 503-504; cf. *Rearick v. Pennsylvania*, 203 U.S. 507. "The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved." *Illinois Central R. R. Co. v. Louisiana R. R. Comm.*, 236 U.S. 157, 163; *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 569.

No claim has been advanced by respondents that the claimants are employees of an instrumentality of the United States and thus in reality employees of the United States, and thus in turn within the exception of the definition of employer of Section 203 (d).[11]

Some claim has been advanced by respondents that transportation by or for the convenience of the government is not commerce but an administrative act of sovereignty in the conduct of its war, referring to the fact that the goods were transported from Seattle to Alaska by ships of the Transportation Corps or the War Shipping Administration.

A short answer to that is that the respondents, private corporations, did the warehousing and re-

[11]Sec. 203 (d) reads as follows: "Employer includes any person acting directly or indirectly in the interests of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a state, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

ceiving for a fee. Moreover, other segments of the interstate journey were effected by private parties, namely: transportation throughout continental United States to Seattle by truck and rail and thus respondent's contention is not at issue.

Moreover, the transportation from Seattle to Alaska by such government agencies must have been considered "commerce" because the primary purpose of such transportation is the movement of cargo as such, as distinguished from the movement of a battleship, or other combat vessels, *Divins v. Hazeltine Electronics Corp.* (1947, C.C.A. 2) 162 F.(2d) ....., 12 C.C.H. Labor Cases, Par. 63,828.

The lower court could not have been impressed by the argument, for on June 20, 1946, it held that communication, transportation and transmission for private persons by combat vessels (e.g. battleships) was "commerce" in *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F.(2d) 334. Insofar as the goods here involved are concerned, that decision is in accord with: *Divins v. Hazeltine Electronics Corp.*, 162 F.(2d) * * * (C.C.A. 2) (armed cargo carriers are in "commerce"); *Clyde v. Broderick*, 144 F.(2d) 348, 350 (C.C.A. 10, 1944) (private goods transported for the convenience of the government is "commerce"); *Bell v. Seton Porter*, 155 F.(2d) 49 (C.C.A. 7, 1946) cert. denied 91 L. ed. 927 (munitions are produced for "commerce" when later transported by and for the government); *Walling v. Patton-Tulley Transp. Co.*, 134 F.(2d) 945 (C.C.A. 6, 1943); *Umthum v. Day & Zimmerman*, 16 N.W.(2d) 258, 235 Iowa 293 (mu-

nitions are produced for "commerce" when later transported by commercial railroads.)[15]

Moreover, the lower courts have unanimously held that purchasing or intermediate handling of government-owned goods by employees of cost-plus-a-fixed-fee contractors for military bases is an activity in commerce[16] and there can be no logical distinction between purchasing such goods as in the cited cases and continuing the interstate transportation at successive intrastate steps to their final destination and there receiving them as in the instant case, for both are directly essential to the movement of the goods.

Goods moved interstate are in commerce even though they never enter the field of commercial

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[15]Other lower court cases where such transportation was either conceded or decided as "commerce" are: *Gorchakoff v. California Shipbuilding Corp.*, 63 F. Supp. 309 (D. C. Cal., 1945); *Peffer v. Federal Cartridge Corp.*, 63 F. Supp. 291 (D.C. Minn., 1945); *Ashworth v. Badger & Sons Co.*, 63 F. Supp. 710; *Timberlake v. Day & Zimmerman*, 49 F. Supp. 28, 33; *Bowers v. Remington Rand*, 64 F. Supp. 620, 625 (D.C. Ill.); *Anderson v. Federal Cartridge Corp.*, 62 F. Supp. 775 (D.C. Minn.), affirmed on other issues 156 F.(2d) 680 (C.C.A. 8, 1946).

Cases contra are: *Deal & Co. v. Leonard*, 196 S.W. (2d) 991, .... Ark. ....; *Silas Mason v. Kennedy*, 68 F. Supp. 578 (D.C. La.); *Barksdale v. Ford, etc.*, 70 F. Supp. 690.

[16]*Lassiter v. Guy F. Atkinson Co.* (W.D. Wash., 1945) unreported opinion, affirmed on other issues (C.C.A. 9, 1947) 162 F.(2d) ....; *Simkins v. Elmhurst Construction Co.*, 46 N.Y.S.(2d) 26, affirmed 50 N.Y.S.(2d) 408 (1944); *Steiner v. Pleasantville Constructors Co.*, 46 N.Y.S.(2d) 120, affirmed 49 N.Y.S.(2d) 42.

competition, *Atlantic Co. v. Walling* (C.C.A. 5, 1943) 131 F.(2d) 518, and *United States v. Underwriters Ass'n.*, 322 U.S. 533, 553, where this Court recalls the great cases involving non-commercial commerce.

*Fleming v. Jacksonville Paper Co.*, 128 F.(2d) 395-398, held that those who sell or deliver across state lines or buy and receive across state lines are employees in commerce whether they write the letters, keep the books, or load and unload, or drive the trucks. In this respect the circuit court of appeals was affirmed by this court in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, at page 572. The foregoing duties likewise satisfy the requirements of *McLeod v. Threlkeld*, 319 U.S. 491, because the goods upon which the claimants worked were themselves in commerce, as distinguished from the cook, who fed the construction workers who worked on the railroad in the *Threlkeld* case.

## CONCLUSION

That the conclusion of law which must follow from the evidentiary findings in this case is that the claimants, and each of them, are engaged in "commerce," as defined by the Fair Labor Standards Act of 1938, and the reliance by the circuit court of appeals on a factual resume' of the record not offered by either counsel in order to disregard *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, should cause this court to issue its writ of certiorari to the circuit court of appeals and to reverse its decision.

Respectfully,

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## CITATIONS





765814—47——1

# In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 359

EDWARD C. SODERBERG, JOHN J. KISSANE AND WILLARD B. HOWELL, PETITIONERS

*v.*

S. BIRCH & SONS CONSTRUCTION CO. AND MORRISON-KNUDSEN CO.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Washington, Northern Division (R. 611–618) is not officially reported. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 633–642) is reported at 163 F. 2d 37.

### JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on July 9,

1947 (R. 643). The petition for certiorari was filed on September 22, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether petitioners and their assignors, employed as clerks, typists, timekeepers, warehousemen and expediters by a Government contractor engaged in the construction of fortifications on Aleutian island bases were "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

## STATUTE INVOLVED

The pertinent part of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. 201, *et seq.*) provides as follows:

> SEC. 7 (a). No employer shall, * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This action was originally brought by petitioners on their own behalf, and, as assignees of their causes of action, on behalf of eighty-two former fellow employees of respondents, to recover overtime compensation, liquidated damages, and counsel fees under the provisions of the Fair Labor Standards Act, *supra* (R. 2–158, 183).[1] The complaint was in eighty-five counts (R. 2–158). It alleged that respondents were engaged in the purchasing and using, selling and furnishing of materials, equipment and supplies in interstate commerce; that petitioners and their assignors, employees of respondents, performed duties constituting an essential part of the handling and the buying, selling and transporting of respondents' goods in interstate commerce; that the performance of such duties constituted "engaging in commerce" within the meaning of the Fair Labor Standards Act; and that respondents had failed to compensate them for hours worked in excess of forty hours per week as provided for in the Act (R. 3–6). The trial court, having found that only certain of the claimants had been "engaged in commerce" within the meaning of the Act (R. 203–207), entered judgment granting in part the relief sought (R. 217) and dismissing

[1] This is a companion case to *F. J. Englert* v. *S. Birch & Sons Construction Co., et al.*, now on petition for a writ of certiorari, No. 358, at this Term.

the other claims (R. 214–216).[2] On appeal, the court below affirmed (R. 643).[3]

The facts which gave rise to this cause of action are briefly summarized as follows:

As a defense measure, the United States, during the past war, undertook to fortify certain of the

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[2] The trial court found claimant in count 16, who acted as camp postmaster, to have been "engaged in commerce or in the production of goods for commerce" within the meaning of the Act, and that he had been employed in excess of 40 hours per week without overtime compensation (R. 203–204). Accordingly, it entered judgment in his favor (R. 217). The trial court further found that claimants in counts 1, 2, and 18, while employed in Seattle, Washington, and claimants in counts 8 and 9, while employed in the camp post office, had been "engaged in commerce or in the production of goods for commerce" within the meaning of the Act (R. 204–207), and entered judgment in their favor for such periods (R. 217). These portions of the judgment were not questioned on appeal (R. 620, 636) and are not in issue here.

At the trial, counts 51, 74, and 81 were dismissed on petitioners' motion (R. 633). The other claims dismissed were those asserted in counts 3–7, 10–15, 17, 19–50, 52–73, 75–80, and 82–85 (R. 209–211, 634).

[3] On appeal, counts 6, 9, 11, 14, 41–50, 53–56, 69, 70, 72, 73, 75, 78, and 85 were dismissed on petitioners' motion (R. 624–625) and the court considered only counts 1–5, 7, 8, 10, 12, 13, 15, 17–40, 57–68, 71, 76, 77, 79, 80, and 82–84 (R. 634).

The petition herein states that it seeks review by this Court of the claims of petitioners *and 26* former employees of respondents (Pet. 2). It then lists *25* claims in which relief is sought (Pet. 2–3, n. 1). The Government assumes that petitioners seek relief in a total of *26* claims, and that the claim of Kissane in count 1 was inadvertently omitted from those listed.

Aleutian islands (R. 178–179, 183, 637).[4] To this end the Government instituted various construction projects whereby essential fortifications and improvements were to be erected on the islands under the direction of the Army Engineers (R. 179, 183–184, 637). Respondents, as joint venturers (R. 184), obtained three construction contracts from the Government. These contracts, designated as contracts 500, 501 and 502, provided in general for the mixing, delivering and placing of asphaltic concrete and asphaltic seal coat on three of the islands (R. 179, 184, 637). They specified that all work would be done under the direction of the Army Engineers, and required respondents to furnish the necessary labor, to perform engineering, laboratory and inspection work, and to supply crews to operate mess halls and quarters (R. 179–180, 184–185, 637–638). Building equipment and rations were furnished by the Government (R. 180, 185, 638).[5]

Respondents' projects required approximately 270,000,000 pounds of materials, supplies, and equipment (R. 180, 185, 638). Of this total ton-

[4] The names of the island have been withheld at the request of the Army, but the islands were owned by the United States and under complete occupation and control by the Army (R. 179).

[5] Pursuant to the terms of respondents' contract the United States is, or may be obligated to reimburse the contractors for money paid in resisting or settling claims arising out of work performed thereunder. Defense of this action was undertaken by the Department of Justice at the request of the War Department.

nage, approximately 94 percent. was procured by the Government[6] and the remaining 6 percent., including repair parts and merchandise intended for resale in Alaska, was procured by respondents' Seattle, Washington, office from various vendors in the United States (R. 180, 185, 638).[7] The majority of respondents' purchases, including all resale merchandise, were delivered in Seattle by rail or truck directly to either Government operated or commercial crating plants, where it was processed for overseas shipment and transhipped by the Government to the Resident Engineer, U. S. Army, in the islands in question, without cost to respondents (R. 181, 185–186, 639). Upon the arrival of a shipload of goods at the projects, the entire handling of all cargo was accomplished by Army personnel without regard to type (R. 181, 186, 639). When needed, supplies and subsistence stores required for mess halls and quar-

[6] Procurement of approximately 90 percent of the materials, supplies, and equipment used in the over-all construction of the projects was effected directly by the Government from various stateside manufacturers and shipped to the projects by Government-furnished transportation (R. 180, 185, 638).

[7] In the purchase of all materials, supplies, and goods, title to the items passed directly to the Government from the vendor. The respondents never, at any time, owned or had title to the purchased materials or merchandise. Shipments from the vendor's place of business to Seattle were by Government bill of lading after inspection and acceptance by the Government at the point of origin, unless the vendor shipped the merchandise f. o. b. Seattle and retained title to such point of delivery (R. 180, 185, 638).

ters were procured at the site of the project from the United States Army Quartermaster Corps (R. 186).

Cargoes of materials, supplies and equipment arriving at the islands were discharged at a Government dock by Army personnel under Army supervision (R. 181, 186, 639). Such goods were thereafter transferred under the direction of the Army by Army personnel to a sorting or classification yard, maintained and operated by the Army and located approximately one-half mile from the dock, where they were sorted and loaded on Government trucks[8] (R. 181, 186–187, 639). The entire handling of all such cargo was accomplished by Army personnel, although the contractors employed two of the claimants herein at the sorting yard as expediters to claim the goods intended for their companies' projects (R. 181, 187, 639).[9]

[8] Asphalt and fuel oil were unloaded from government vessels, and were hauled by Army personnel to stock piles or dumps located at advantageous points where they were drawn upon by respondents' employees as required (R. 191).

[9] Respondents employed Scheid, claimant in count 18 and Robinson, claimant in count 68, as expediters (R. 187). Claimant Robinson was first employed as a clerk in the resale commissary store. He was transferred to the job as expediter on August 4, 1944, and was so employed until December 30, 1944. (R. 187, 488–491.) It was shown that Robinson worked at the sorting yard on an average of three days a month (R. 492). Claimant Scheid was first employed as an expediter in respondents' Seattle office (R. 496–497). He has been awarded judgment for overtime compensation while so employed (R. 217) and that portion of his claim is

From the sorting yard the goods were transported by Government truck [10] to the several Government warehouses occupied by respondents at each of the projects (R. 187–188). Specific types of materials, supplies and equipment needed for construction were redistributed from the central warehouse at each project [11] to other warehouses for storage and issuance as needed (R. 188). The claimants herein, who were employed at these central warehouses, performed the mixed duties of clerks and warehousemen (R. 188–190). These duties consisted of tallying or listing goods received, transferred or issued; stowing goods; maintaining perpetual inventories; and submitting reports of goods received to the office

not now in issue (R. 620). He testified that while in the islands he had worked as an expediter from August 1944 to November 1944 during which time 20 vessels discharged (R. 500) and that at one time he found three boxes of merchandise that had been mislaid (R. 499).

[10] These trucks were operated by Army personnel or respondents' employees (R. 187). No claim is here made (Pet. 4–7), and the courts below did not find, that any of the claimants herein had been engaged as truck drivers.

[11] On Project 500, materials, supplies, and equipment needed for construction purposes were taken direct to the "materials and supplies" warehouse and supplies designated as resale goods were taken direct to the "resale goods" warehouse (R. 187). On Project 502, all materials, including "resale goods", were taken first to the "materials and supplies" warehouse (R. 187–188). On both projects, the "materials and supplies" warehouses were the central warehouses for the storage of the general materials, supplies, and equipment needed for construction purposes (R. 188).

manager located at the project sites (R. 188). The personnel so employed performed no duties in connection with the ordering of materials, supplies or equipment or in the transportation of goods in interstate commerce (R. 188, 641).[12]

Under their contract,[13] respondents operated for the Government, at each project site, a com-

[12] Claimant Howell was supervisor of the "materials and supplies warehouse" at Project 502 (R. 189, 388). It was shown that he had no connection with any merchandise until it arrived at the warehouse at the job site (R. 399–401). Claimant Stewart, an inventory and tally clerk in the "materials and supplies" warehouse at Project 502 (R. 189, 459), had no contact with the goods until after their arrival at the warehouse (R. 461–463). Claimant Mayfield had no other duties than that of perpetual inventory clerk (R. 189, 557–558). Claimant Showalter merely kept the record of receipts and disbursements of goods (R. 189–190, 455) and had no connection with their shipment or transportation (R. 456). Claimant Stockemer was employed merely as a receiving clerk (R. 190, 482, 486). Claimants Cox and Brown, records clerks, had no contacts with the goods except at the warehouse (R. 190, 529, 530, 327). Claimant Krampert, employed as a clerk, and claimants Koons and Buchanan, clerk-typists, had no connection with the transportation of goods (R. 190, 475, 531–533), nor did claimants Taylor, Wilcox, and Sinema who were employed as clerks (R. 189, 190, 561–563). Smith, claimant in count 80, a clerk in the automotive repair shop warehouse, merely drew supplies from the central warehouse (R. 190, 495).

[13] Under the contracts, respondents were also required to operate and supervise the camps at the project sites, and the housing and mess facilities for employees (R. 198). This work was performed under the supervision of a camp manager (R. 198). The only claimant herein who was employed at a camp is claimant Ferrell (see n. 17, *infra*, p. 12) who performed clerical duties in the camp manager's office (R. 199).

missary or "resale" stores, where retail goods were sold to the various personnel in the islands irrespective of whether or not they were respondents' employees[14] (R. 191, 640). Separate warehousing was maintained for the storage of supplies sold in these stores which were designated as "resale goods" warehouses (R. 191). The duties of the personnel employed in these "resale" stores and "resale goods" warehouses consisted of making retail sales and of keeping records of the transfer of supplies to the "resale goods" warehouses and from such warehouses to the "resale" stores (R. 191–192). These personnel did not perform any duties in connection with the ordering or transporting in interstate commerce of the commissary supplies to the project site.[15]

[14] There was a 15% to 40% mark-up in the price of goods over the cost to the Government. Receipts from retail sales were accounted for to the Resident Engineer, and the profits realized accrued to the Government. Title to the goods sold in the commissary was in the Government at all times. (R. 191.)

[15] The following claimants herein were employed in the resale goods warehouses and commissary stores: Soderberg, count 2; Hazelberg, count 7; Ferrell, count 8; Lindgren, count 10; Showalter, count 22; Strini, count 17; Downs, count 33; Roach, count 61; Ayres, count 67; Robinson, count 68; and Law, count 77 (R. 192–194). Claimant Soderberg has been awarded judgment for overtime compensation for his employment in respondents' Seattle office (R. 217) and that portion of his claim is not now in issue (R. 620). Claimant Ferrell has been awarded judgment for overtime compensation for his employment at respondents' "Camp Post Office" (R. 204–205, 217) and that portion of his claim

Respondents maintained general construction offices at the project sites under the general direction and supervision of an office manager and project manager (R. 194). Personnel employed here included clerks, typists, timekeepers and pay-roll clerks (R. 194).[16] The trial court found

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is not now in issue (R. 620). Soderberg, who was storekeeper in charge of the resale goods warehouse at Project 502 (R. 192), testified that he had nothing to do with the purchase of or the transportation of resale goods to the islands (R. 372) and that neither he nor any of the men who worked under him had any contact with the goods until after they had reached the island (R. 379). He testified that he had made two shipments of goods to other islands in the Aleutian chain (R. 383). Ferrell was employed at the resale goods warehouse for 30 days in the capacity of night watchman (R. 548–549). Claimants Hazelberg, Roach, Strini, and Downs were employed as clerks in the resale goods warehouse at Project 502 (R. 193). Claimant Ayres was employed as a warehouse clerk at Project 500 (R. 193) and testified that he had nothing to do with the goods until after they had arrived at the warehouse (R. 250, 252–253). Claimant Lindgren was employed as manager of the resale store at Project 502 (R. 193) and merely drew goods from the resale goods warehouse (R. 553). Claimant Showalter, who had also been employed at the materials and supplies warehouse at Project 502 (see n. 12, *supra*, p. 9) made over-the-counter sales at the resale store at Project 502 (R. 193, 449). Claimant Robinson, who had also been employed as an expediter (see n. 9, *supra*, pp. 7–8) and claimant Law, were employed as sales clerks at the Project 500 resale goods store (R. 194).

[16] After payment, certified copies of the pay rolls were transmitted to respondents' Seattle office. The timekeepers and pay-roll clerks had no part in forwarding these copies to Seattle. (R. 194–195.)

that none of these personnel were engaged in interstate commerce (R. 195, 641).[17]

**ARGUMENT**

The sole question presented is whether the claimants herein were "* * * engaged in commerce * * *" within the meaning of the Fair Labor Standards Act. Both courts below held that petitioner had failed to show that their duties were closely enough related to interstate commerce to be a part thereof and that, accordingly, they were not within the coverage of the Act.[18] We submit that the decisions below are correct and that, contrary to petitioners' sugges-

[17] Prior to his employment in Alaska, petitioner Kissane had been employer in respondents' Seattle office (R. 205–206). He had been awarded judgment for overtime compensation while so employed (R. 217) and that portion of his claim is not now in issue (R. 620). In Alaska, Kissane was employed at Project 502 as an auditor (June 1, 1944, to September 16, 1944) and as chief timekeeper (September 16, 1944, to December 20, 1944) (R. 195). As an auditor, he made sales analyses of the resale goods store sales (R. 195). As chief timekeeper, he supervised the work of timekeepers, assigned their duties, checked time reports and was generally responsible for the efficient conduct of the time office (R. 195). Claimant Ferrell (see n. 13, *supra*, p. 9), was employed in the general office for approximately six weeks in the capacity of clerk typist (R. 195–196). Claimant Kouns (see n. 12, *supra*, p. 9), was employed as a general clerk and typist for approximately two months (R. 197).

[18] As noted throughout our statement of the case, some of the claimants herein, in certain aspects of their duties, were considered by the courts below to have been within the coverage of the statute and were given judgment to that extent (R. 216, 620). Such claims are not involved herein.

tion (Pet. 12–15), there is no conflict with the decisions of this Court.

1. Petitioners urge that a reversal of the judgment below is compelled by *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (Pet. 12). They argue that the interstate movement of the goods involved did not end until their arrival at the commissary or "resale" stores or at the construction site (Pet. 12); and they assert that they performed duties in connection with such movements prior to those points (Pet. 12). In support of this argument, they cite a ruling by the Administrator of the Wage and Hour Division, [1947] WH Man. pp. 9–10, to the effect that warehouse personnel checking out-of-state movements of goods on an unloading platform and removing them to the interior of the warehouse are within the coverage of the Act (Pet. 13).

The vice of petitioners' argument is clear. Unlike the situation presented in the *Jacksonville Paper Co.* case, the respondents herein were not mere intermediaries in the movement of goods from the manufacturers to a particular customer. 317 U. S. at 566.[19] They were engaged in new and original construction at the ultimate des-

[19] In the *Jacksonville Paper Co.* case, this Court was dealing with employees of the wholesaling industry, the medium through which large-scale sources of supply meet a nationwide demand. The Government urged that the warehouse employees of a wholesaler were within the coverage of the Act. It was pointed out that the economic function of the wholesaler was to make available to his trade the products

tination of the goods, an Alaskan Army base, a purely local activity (R. 612) under the direction of the Army Engineers (R. 179, 184, 612, 637–638). It has been uniformly held that local construction employees are not within the coverage of the Act (*Cohen, et al.* v. *Cauldwell Wingate Co.*, 296 N. Y. 776, certiorari denied on October 20, 1947, No. 255, this Term, and cases cited at page 6 of the Brief in Opposition filed in that case), a judicial view entirely consistent with an official interpretation of the statute by the Administrator of the Wage and Hour Division. Interpretative Bulletin No. 5, Paragraph 12 ([1944–1945] Wage and Hour Manual 23).

Thus, the essential problem presented by a coverage case under the Act, that of "drawing lines" (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523; *10 East 40th St. Co.* v. *Callus*, 325 U. S. 578, 584), has been fully explored in so far as the needs of this case are concerned. Nor can it here be successfully contended that the judgments below did not result from full inquiry into the "* * * special facts pertaining to the particular business." *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 572. See *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128. *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 90. Accordingly, we submit

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of widely scattered factories, mines, farms, and forests, and that his warehouse was a machine for the movement of goods rather than as a space for storing merchandise (Government's Brief, pp. 13–14).

that claimants' duties, at best remotely connected with any "channels of interstate commerce" (*McLeod* v. *Threlkeld,* 319 U. S. 491, 494), were not concerned with the movement of materials or personnel in interstate commerce within the meaning of the statute and that the judgments below were correct (R. 182–217, 612, 640–641).

2. Even assuming, *arguendo,* as petitioners apparently contend, that the *Jacksonville Paper Co.* case applies to local new construction projects as well as to commercial wholesale warehouses, it is clear that petitioners may not succeed herein. Here, there was no mere "ritual" of placing the goods in respondents' warehouses to defeat the purposes of the Act. 317 U. S. at 568. Title to all of the goods involved was in the Government (R. 180–181, 185, 638). Such goods were consigned to and shipped directly to the Resident Engineer, U. S. Army (R. 181, 186, 639) and, upon arrival in the islands, were delivered by the Army, or by certain of respondents' employees not involved in the instant action (see pp. 6–7, *supra*), to respondents' warehouses (R. 181, 186–188, 639). It was at this point that the continuity of movement and the interstate character of the shipments ended, since respondents were the ultimate consignees. The warehouse was an integral part of the project to which the goods were destined, not an intermediate stopping place. *Walling* v. *Jacksonville Paper Co.,* 317

U. S. at 568; cf. *Higgins* v. *Carr Bros Co.*, 317 U. S. 572. No work was performed by 24 of the 26 claimants herein until subsequent to the arrival of the goods at the central warehouse (see pp. 8–11, *supra*) and such claimants clearly could not be considered as having been "engaged in commerce" within the meaning of the Act.[20]

3. Petitioners urge as error that the court below did not reiterate the detailed findings of the district court, and, further, that the court below examined the testimony and stipulations in the record "which were never collected by either counsel for review * * *" (Pet. 11). It is difficult to see the direction of this argument. The court below affirmed the district court judgment and, in so doing, did not diverge from the district court's findings in any material respect. The findings of the trial court closely parallel the facts stipulated by the parties and are fully supported by the testimony. We cannot see that there are thus presented any "procedural prob-

[20] With respect to the question whether the two expediters, Robinson (count 68) and Scheid (count 18), who assisted Army personnel in "claiming" the goods at the classification yard, were employed in the "channels of interstate commerce," the record does not disclose that they assisted in the unloading of incoming vessels, handled any goods, or did more than identify the goods at the classification yard. We submit that, at best, they were only remotely connected with the stream of commerce (*McLeod* v. *Threlkeld*, 319 U. S. 491, 494), and that no question warranting certiorari is presented by their claims.

lems" (Pet. 11) or any basis for urging that the court below erred in affirming the trial court's conclusion.

## CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted.

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